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Supreme Court of the United States

OCTOBER TERM, 1954

No. 719

JERRY ALLEN NILES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Supreme Court of the United States

OCTOBER TERM, 1954

No.

JERRY ALLEN NILES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Northern District of California, Southern Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix A to this petition (page 11). The opinion of the District Court is reported. (122 F. Supp. 382) It is printed as Appendix B, *infra*, pages 12-15.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1955. (See Appendix C to this petition, page 16, *infra.*) The time for filing this petition for writ of certiorari expires April 15, 1955. This petition for writ of certiorari is filed within the time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37(b) (2) and 45(a), Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U. S. C. § 3231.

QUESTIONS PRESENTED

I.

Whether Sections 1660.1 and 1660.20 of the Selective Service Regulations and the local board's order for Niles to perform civilian work at the Los Angeles County Department of Charities, issued pursuant to such sections, are not authorized by the Universal Military Training and Service Act and are in conflict therewith because the work is private and not public and is not "national" or "federal" as required by the act.

II.

Whether the order to perform civilian work at the Los Angeles County Department of Charities constitutes a construction and an application of the Universal Military Training and Service Act and the regulations that bring them into conflict with the provisions of the Thirteenth Amendment to the United States Constitution because the work is private and not public and is not of "national" or "federal" nature and does not contribute to the "national" welfare.

III.

Whether the order to do civilian work in the Los Angeles County Department of Charities constitutes a construction and application of the act and regulations that bring them into conflict with the provisions of the Fifth Amendment

to the United States Constitution because petitioner is being restrained of his liberty without due process of law.

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) is involved. Also, Section 6(j) of the act must be considered (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86). See also Section 12(a) of the act (50 U. S. C. App. § 462(a)).

Section 1660.1 and Section 1660.20 of the regulations (32 C. F. R. §§ 1660.1 and 1660.20) are involved. These are extensive provisions which are printed as Appendix D, *infra,* pages 18-22.

STATEMENT OF THE CASE

Petitioner was indicted for failure to comply with an order of his local board directing him to do "civilian work contributing to the maintenance of the national health, safety and interest." [R. 3-4] He waived a trial by jury. [R. 7] His trial was called in the District Court on April 23, 1954. [R. 7-8]

Petitioner was born August 1, 1931. [R. 18] He registered with his local board on September 21, 1949. [R. 19] He filed a classification questionnaire showing that he was a conscientious objector. [R. 19-20] He filed a special form for conscientious objector on November 22, 1950. [R. 20] While he was classified I-A by his local board, upon appeal he was classified as a conscientious objector, on September 27, 1951. [R. 20]

On the return of the file to the local board he was requested to make a statement of his preferences for different types of civilian work as a conscientious objector. [R. 21] Petitioner stated his qualifications to do metal work and wood work. [R. 21] The petitioner was then asked to make one choice of three different types of charitable work. One was that of being a helper for the Los Angeles County

Department of Charities. [R. 21] Another job was that of a helper at Camarillo State Hospital. [R. 21] The other was that of a truck driver for Goodwill Industries. [R. 21][1] Petitioner refused to make a choice of employment. [R. 21-22]

Petitioner then was requested to appear before the board on March 31, 1953, for an interview with the board members and a representative of the state director. He appeared and stated that the work was unsavory and the salary was insulting. [R. 22] He stated that he did not want the type of work that he had been offered and refused to sign an acceptance of any civilian job offered him. [R. 22]

Petitioner was ordered to report for a physical examination on May 1, 1953. He was found to be physically acceptable on May 11, 1953. [R. 22] On August 24, 1953, he was ordered to report for civilian work. [R. 22] The pertinent part of the order reads as follows:

> "Having been found to be acceptable for civilian work contributing to the maintenance of the national health, safety, or interest you have been assigned to institutional work located at Dept. of Charities, 110 North Mission Rd., Los Angeles County, Los Angeles 33, California.
>
> "You are ordered to report to the local board named above at (hour) 8:30 m. on the 4th day of September, 1953, where you will be given instructions to proceed to the place of employment.
>
> "You are ordered to report for employment pursuant to the instructions of the local board, to remain in employment for twenty-four (24) consecutive months or until such time as you are released or transferred by proper authority.

[1] An order directing a registrant to do work for Goodwill Industries was held to be a violation of the act because the work was private and not public employment.—*United States* v. *Copeland,* D. Conn., 1954, 126 F. Supp. 734.

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"You will be instructed as to your duties at the place of employment.

"Failure to report at the hour and on the day named in this order, or to proceed to the place of employment pursuant to instructions, or to remain in this employment the specified time will constitute a violation of the Universal Military Training and Service Act, as amended, which is punishable by fine or imprisonment or both."[2]

Petitioner appeared at the local board on September 4, 1953, and signed a statement that he refused to do the work because it was "not in harmony with principles of freedom set forth in the Constitution and the Bill of Rights." (Government's Exhibit 1, paper marked 6 and (172)) [R. 22-23]

The local board wrote the Los Angeles County Department of Charities on September 11, 1953, inquiring if Niles had reported. (Government's Exhibit 1, paper marked 5 and (173)) The Los Angeles County Department of Charities filled out the statement of employer certifying that petitioner "failed to report for civilian work." (Government's Exhibit 1, paper marked 4 and (161))

The petitioner was found guilty of violating the act in failing to comply with the order to report to do civilian work. [R. 10] (*United States* v. *Niles*, N. D. Cal. S. D., June 8, 1954, 122 F. Supp. 382) On June 17, 1954, he was committed to the custody of the Attorney General for a period of 18 months. [R. 11-12] Petitioner appealed to the Court of Appeals. [R. 12-13] The Court of Appeals affirmed the conviction on March 16, 1955. [R. 49-50]

[2] Government's Exhibit 1, a photostatic copy of the draft board file. See paper marked 4 at the upper left-hand corner of the page in the back part of the file. It is also marked (161) at the bottom on the right-hand side of the page.

REASONS FOR GRANTING THE WRIT

I.

The key word of Section 456(j) of the Universal Military Training and Service Act and Section 1660.1 of the Selective Service Regulations is "national." This word distinguishes the work contributing to *national* health, safety and interest from state, city or county. The word "national" means federal.—28 "Words and Phrases," 21-25; 65 C. J. S. 38-39; *Bouvier's Law Dictionary,* Baldwin's Century Edition, Cleveland, Banks-Baldwin Law Publishing Company, 1940; Webster's *New International Dictionary,* Second Edition, G. & C. Merriam Co., 1950, page 1629.

The federal criminal code prohibits the use of the word "national" in advertisement for all except the federal government. (18 U. S. C. A. § 709) A national bank is a federal bank as distinguished from a state bank.—12 U. S. C. § 583; 32 Opinions of the Attorney General 473 (1921); *Byers* v. *United States,* 10th Cir., 1949, 175 F. 2d 654, cert. denied 338 U. S. 887; *First National Bank* v. *First State Bank,* Tex. Com. App., 1927, 291 S. W. 206.

Under the 1940 law (50 U. S. C. App. §§ 301-318) conscientious objectors were required to do national civilian work. The camps where such work was required to be performed were always under the direct control of the federal government. While some camps were operated by civilians and religious institutions they were federal camps. They were maintained by federal money. The United States government had direct supervision of such camps. The camps were not state, city, county or private camps. They were federal or national camps. Congress, in using the word "national" in the present law, had in mind the same requirement of federal work as did the Congress under the 1940 law. Since there was no nonfederal work intended to be performed by conscientious objectors under the 1940 law, Congress, by using the word "national" in the present law, also intended that there would be no nonfederal work under the present law.

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A substantial question of federal criminal law under the administration of the Universal Military Training and Service Act insofar as it relates to conscientious objectors performing civilian work is here involved. This important question has not been determined but ought to be determined by this Court.

II.

In event it is concluded that the federal statute involved authorizes the local board to command the petitioner to do the civilian work for the Los Angeles County Board of Charities, then there is presented another important question of federal criminal law under the enforcement of the Universal Military Training and Service Act. It is whether the act and the regulations, as construed and applied, call for a private labor draft for nonfederal purposes, in violation of the Thirteenth Amendment. This important question has not been determined but ought to be decided by this Court.

Congress has the authority to draft men to perform military service. It also has the right to designate some sort of federal work for performance by conscientious objectors. A drafted person cannot be put to work for private industry. (*United States* v. *Copeland*, D. Conn., 1954, 126 F. Supp. 734) A soldier cannot be ordered to do janitor work in the state capitol building. This would not be extraordinary service within the meaning of the Thirteenth Amendment. If a soldier drafted under the law cannot be ordered to work in the state capitol building as a janitor, then by force of the same reason a conscientious objector cannot be compelled to do civilian work for a county department of charities. Petitioner was ordered to do institutional work in the Los Angeles County Department of Charities. His duties were not defined. He may be ordered to work in some private charity for the county; he may be required to work in a state hospital.

The work that petitioner was ordered to do was not alternate conscription service for the federal government.

The service he was ordered to perform was not exceptional within the meaning of the Thirteenth Amendment. The *Selective Draft Law Cases* (*Arver* v. *United States*), 245 U. S. 366 (1918), are not in point. Also, *United States* v. *Brooks*, S. D. N. Y., 1944, 54 F. Supp. 997, 2d Cir., 1944, 147 F. 2d 134, is not in point. There are numerous similar cases decided by the Courts of Appeals, holding that the performance of work by conscientious objectors in federal civilian public service camps did not violate the Thirteenth Amendment. These cases are not in point, because there the work done was federal and was alternate service, which was exceptional. Here, however, the work is not alternate service, is not exceptional, but is an arbitrary order to do work for the county government of Los Angeles County, which is not authorized by the Thirteenth Amendment. The act and the regulations and the order in this case conflict with the principles of *Pollock* v. *Williams*, 332 U. S. 4, 7-13 (1944); *Hurd* v. *Hodge*, 334 U. S. 24, 31-32 (1948); *Bailey* v. *Alabama*, 219 U. S. 219; *Taylor* v. *Georgia*, 315 U. S. 25 (1942).

Hodges v. *United States*, 203 U. S. 1 (1906), involved an indictment seeking enforcement of the criminal sanctions clause of the Civil Rights Act. While the dismissal of the indictments was ordered, the court wrote on the subject of "involuntary servitude" words used in the Thirteenth Amendment. The Court said: "The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is the denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits

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one race to the Nation it commits every race and every individual thereof."—203 U. S., at pages 16-17.

It is submitted that a substantial question is involved as to whether the act, the regulations and the order violate the Thirteenth Amendment. This question has not been heretofore determined by this Court, but it ought to be settled by the Court's granting the writ of certiorari in this case.

III.

The decision of the court below is in conflict with Ex parte *Mitsuye Endo,* 323 U. S. 283, 299 (1944). Compare Ex parte *Milligan,* 4 Wall. 2, 120-121 (1866); and *Cummings* v. *Missouri,* 4 Wall. 277, 325 (1866).

A selective service case deemed worthy of mention on this question is *United States* v. *Emery,* 2d Cir., 1948, 168 F. 2d 454. The prosecution was under the 1940 Act for a conscientious objector's leaving detached service "for which he had volunteered." He had previously been hired out as a volunteer laborer from a Civilian Public Service Camp "to do private dairy herd testing." The prevailing wages for this farm-out laborer were paid to his employer, the federal government. Out of his wages he was paid the $15-a-month Civilian Public Service Camp allowance by the federal government. The balance of his wages were paid into a separate fund of the United States Treasury.

Niles was not a volunteer. The *Emery* case (168 F. 2d 454) is not in point. It is to be noted that the United States Court of Appeals for the Second Circuit held that, as to the wages paid the defendant, his rights under the First and Fifth Amendments had not been violated. The court, at 168 F. 2d 454, page 456, said: ". . . The conscientious objector cannot refuse to perform his work of national importance even if he thinks he is being underpaid and acts on conscientious scruples to avoid what he considers the status of contract labor." The language was dictum since the defendant was in no position to assert the defenses, because he had volunteered for the work he later questioned.

Had it been without his consent the case would have been different. Also, the points on forced labor were not presented in that case, as they have been here, which distinguishes that case.

It is submitted that inasmuch as the petitioner in this case did not consent to the work and since he was ordered to do work not in the "national" or "federal" interest or welfare, as distinguished from "state" or "local" welfare, and because the work was against his wishes, it is plain that he has been deprived of his rights, contrary to the due-process clause of the Fifth Amendment to the United States Constitution.

There is a conflict between the holding by the court below and decisions of this Court on this point. In the event the Court fails to find a conflict, it is submitted that there is involved an important question of federal law that has not been determined but that ought to be decided by this Court.

CONCLUSION

For the reasons above stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

Opinion of Court Below

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jerry Allen Niles,
Appellant,

vs.

United States of America,
Appellee.

No. 14,452
Mar. 16, 1955

Appeal from the United States District Court for the Northern District of California, Southern Division

---

BEFORE: HEALY and BONE, Circuit Judges, and MURRAY, District Judge

PER CURIAM

Appellant, a conscientious objector, was classified 1-O by the appropriate local Selective Service Board. After due compliance with the provisions of the regulations, the Board assigned him to institutional work with the Los Angeles Department of Charities, a public organization of Los Angeles County, California. He failed to obey the assignment order and was indicted and convicted for violation of the Military Training and Service Act, 50 App. USCA §462(a).

The judgment of conviction is affirmed for the reasons given by the trial court, 122 F. Supp. 382.

APPENDIX B

OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JERRY ALLEN NILES,
Defendant.

No. 33,878
June 8, 1954

ROCHE, District Judge.

On January 8, 1952, defendant was classified 1-O (conscientious objector opposed to both combatant and noncombatant training and service) by his local board.

On February 13, 1953, defendant was sent a selective service form setting forth various civilian jobs he could accept in lieu of induction into the armed forces. The three positions offered were as follows: (1) institutional helper of the County of Los Angeles, Department of Charities, (2) psychiatric technician helper at Camarillo or Mendocino State Hospitals, (3) building maintenance man, salesman, truck driver, etc. for the Goodwill Industries in several California cities. This form was returned to the local board by the defendant with a statement that he did not wish to perform the types of work offered to him.

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Acting under and pursuant to the provisions of Sec. 1660.1 of the Selective Service Regulations, and Section 456(j) of the Universal Military Training and Service Act, 50 U. S. C. A. Appendix, § 456(j), 65 Stat. 83, approved June 19, 1951, the local board ordered the defendant to report for employment, more particularly set forth in the order as follows:

> "Having been found to be acceptable for civilian work contributing to the maintenance of the national health, safety or interest, you have been assigned to institutional work located at Dept. of Charities, 110 North Mission Rd., Los Angeles County, Los Angeles, 33, California."

Defendant failed to obey this order, and on January 20, 1954, was indicted for knowingly failing to obey its directions.

The defendant's first contention is that the work assigned to him by the local board, as well as the Selective Service Regulations, are in conflict with the intent of congress as expressed in the Military Training and Service Act, which provides that objectors shall be assigned "such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *." 50 U. S. C. A. Appendix, § 456(j).

A health program conducted by any political subdivision of this nation contributes to the general welfare of the nation as a whole. The mere fact that such activities are carried out in the name of a political subdivision of the state or county rather than in the name of the United States itself, does not diminish the importance of the work, or cause it to lose its contributory relationship to the national health.

Defendant next contends that the Military Training and Service Act, as construed and applied by the Regulations and the local board's order, calls for a private non-federal labor draft for the performance of services that

are not exceptional or related to the national defense in violation of the 13th Amendment of the United States Constitution; and further that the Act deprives the defendant of due process of law contrary to the 5th Amendment.

The constitutionality of the Selective Service law has been attacked on many occasions. In every case the constitutionality of the law has been upheld. *United States* v. *Henderson,* 7 Cir., 180 F. 2d 711; *Richter* v. *United States,* 9 Cir., 181 F. 2d 591.

It is well settled that congress has the right to require service of an objector in work of national importance without violating the 13th Amendment. *Heflin* v. *Sanford,* 5 Cir., 142 F. 2d 798, 799.

Whether or not the requirement that work of national importance be done with an agency other than an agency of the United States government is violative of this constitutional provision is a question which has been raised but once before. *U. S. of America* v. *Wylie,* No. 11060, D. C. N. D. Cal. May 3, 1954. The court in that case ruled that it is not violative of the 13th Amendment. I am in accord with this holding. The 13th Amendment abolished slavery and involuntary servitude, except as a punishment for crime, but was never intended to limit the war powers of government, or its right to exact by law public service from all to meet the public need. *Heflin* v. *Sanford, supra.*

Defendant contends that the Act as construed by the Regulations and order of the local board deprives him of due process of law because the means selected do not have a real and substantial relation to the object sought to be obtained. The object of the Act and the Regulations is to exact public service from all to meet the public need. Defendant has refused to serve in one capacity, and has been offered as an alternative the privilege of serving in another capacity, one which it is felt will serve the country's need. Certainly national defense and preparedness is ac-

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complished by more than the strength of arms alone. In the position offered to defendant is an opportunity to contribute to the national welfare.

As its last contention defendant maintains that the Act as construed by the Regulations and order is unconstitutional in that it is an unlawful delegation of legislative and presidential authority. Defendant states that it is possible under the order of the local board that he will be assigned to work which may have no relation to health, safety, or interest of a national scope. In view of the fact that this court has construed employment in a state charitable institution as work contributing to the maintenance of the national health, safety, or interest, any work done by defendant for such institution within the scope of its operation, is proper and in accordance with the standard set forth by congress.

In accordance with the above

It is ordered that the motion of defendant for acquittal be and the same is hereby denied.

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JERRY ALLEN NILES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 14,452

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

APPENDIX D

Statutes and Regulations Involved

Section 1(c) of the Act

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1 (a) 65 Stat. 75.

Section 6(j) of the Act

Section 6(j) of the act (50 U. S. C. App. § 456 (j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President

may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sus-

tained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the Act

Section 12(a) of the act (50 U. S. C. App. § 462 (a), 62 Stat. 622) provides:

". . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

Section 1660.1 of the Regulations

Section 1660.1 of the Selective Service Regulations (32 C. F. R. § 1660.1 (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952)) provides:

"*Definition of Appropriate Civilian Work.*—(a) The types of employment which may be considered under the provisions of section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

(1) Employment by the United States Government, or

by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

Section 1660.20 of the Regulations

Section 1660.20 of the Selective Service Regulations (32 C. F. R. § 1660.20 (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952)) provides:

"*Determination of Type of Civilian Work to Be Performed and Order by the Local Board to Perform Such Work.*—(a) When a registrant in Class I-O is found acceptable for service after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after notice of acceptability is mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any one of these types of work to be appropriate, it

will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(b) If the registrant fails to submit to the local board types of work which he offers to perform, or if the local board finds that none of the types of work submitted by the registrant is appropriate, the local board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. The registrant, within ten days after such letter is mailed to him by the local board, shall file with the board a statement that he either offers to perform one of the types of work submitted by the board, or that he does not offer to perform any of such types of work. If the registrant offers to perform any one of the three types of work, he shall be ordered by the local board to perform such work in lieu of induction, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. The local board shall mail to the registrant a notice of the time and place of this meeting at least 10 days before the date of the meeting. If agreement is reached at this meeting, the registrant shall be ordered by the local board to perform work in lieu of induction in accordance with such agreement, but such order shall not

be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 719

JERRY ALLEN NILES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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MAY IT PLEASE THE COURT:

Now comes the petitioner and submits to the Court his Supplemental Brief in support of his petition for writ of certiorari.

At the time the petition for writ of certiorari was prepared petitioner overlooked one important point that should have been included in the petition as a reason for granting the writ. This Supplemental Brief supports subdivison 1 under Reasons for Granting the Writ, on pages 6 and 7 of the petition.

The courts below take the position in their opinions that Congress did not intend to limit the performance of civilian work to a federal agency. The courts below ignore completely the fact that the provisions of the Universal Military Training and Service Act (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86) requiring performance of civilian work by a conscientious objector, are almost the same as the provisions of the Selective Training and Service Act of 1940 (50 U. S. C. App. §§ 301-318, 54 Stat. 885) for the performance of civilian work by conscientious objectors.

The 1940 law was never construed, applied or interpreted to authorize state or private employment of conscientious objectors. The interpretation of the 1940 law was outstanding for over ten years when the Universal Military Training and Service Act was adopted. The passage of the Universal Military Training and Service Act constituted a re-enactment of the old provisions in the 1940 law about the work to be done by conscientious objectors.

When Congress passed the Universal Military Training and Service Act, re-enacting the old law, Congress thereby approved the administrative interpretation placed upon the 1940 law, which restricted the performance of civilian work by conscientious objectors to federal agencies. The adoption of this administrative interpretation constituted a legislative limitation of the performance of civilian work by conscientious objectors to service only for the federal government or agencies of the federal government. It shows a congressional intent not to allow an extension of the service by conscientious objectors in state or private agencies.

The 1940 law (50 U. S. C. App. §§ 301-318, 54 Stat. 885) in Section 5(g)provided, among other things, as follows:

> "... Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted ... be assigned to noncombatant service ... or

> . . . if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. . . ."

Sections 652.1, 652.2 and 652.11 of the Selective Service Regulations under the 1940 law provided for the performance of such work in civilian public service camps operated by the Director of Selective Service.

The provisions of the present law (50 U. S. C. App. § 456 (j), 65 Stat. 75, 83, 86) are for the performance of the same kind of work as Congress provided for under the 1940 law. Because of remarks on the floor of Congress by members of the House and Senate that it was intended that the government not operate civilian public service camps, the regulations under the present law did not provide for the maintenance of such camps. The conscientious objector by regulations was made liable for the performance of civilian work in governmental and state agencies.

The Selective Service Regulations interpreting the 1940 law were an outstanding administrative interpretation showing congressional intent when the present law was enacted to confine the civilian work to federal employment, as was the case under the 1940 law. Nothing was said on the floor of Congress, or in the law itself, that authorized state or private employment of conscientious objectors under the law. The outstanding interpretation by officials charged with the administration of the 1940 law, substantially the same as the present law, should be followed. The interpretation of the law requiring federal employment rather than state or private employment received congressional approval when substantially the same provisions of the old law were enacted into the present law without change.

In *Sterrett* v. *United States*, 9th Cir., 1954, 216 F. 2d 659, the court said:

> "Such had been the interpretation of this provision of the Act of Congress for a period of approximately twelve years. Such interpretations by those charged with the Act's administration are entitled to persuasive weight. *Billings* v. *Truesdell,* 321 U. S. 542, 552; *United States* v. *Alabama Railroad Co.,* 142 U. S. 615, 621; *Luckenbach SS Co.* v. *United States,* 280 U. S. 173, 181; *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 757. In other words, the construction of the Act for which the appellants here argue is the same construction which the officers charged with its administration had placed upon it for this considerable period of time.
>
> There is a further reason why we think we must thus construe the Act. When Congress substantially reenacted the provisions of the 1940 Act, the Administrative Regulations thus interpreting and construing the Act and long continued without substantial change will be deemed to have received Congressional approval. It has been said that in similar cases the Regulations have the effect of law. *Helvering* v. *Winmill,* 305 U. S. 79, 83; *United States* v. *Zazove,* 334 U. S. 602, 623; *Hartley* v. *Commissioner,* 295 U. S. 216, 220."

It is respectfully submitted that this rule should be applied here, to outlaw state or private employment by conscientious objectors under the act authorized by the present regulations.

The Court should not find any broader congressional intent for the employment of conscientious objectors under the law than Congress authorized for members of the armed forces. Soldiers were not intended to be farmed out for service of the state governments. There is nothing in the act to indicate that it was intended that conscientious objectors should be farmed out to state or private agencies for service. If a soldier cannot be lawfully transferred to

the state government to act as an employee in a state hospital under the law, then by force of the same reason a conscientious objector cannot be ordered to do similiar service in state or private hospitals, in the absence of a specific provision in the act itself commanding such service.

Here the courts below have taken the statute and read into it something that is not fairly intended by Congress to be the law. The courts must interpret, not make, the law. Judicial legislation of the character contended by the courts below is not permitted.

For the reasons stated in the petition for writ of certiorari and in this supplemental brief the petition for writ of certiorari should be granted.

Respectfully submitted,

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April, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 719

JERRY ALLEN NILES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 11) is not yet reported. The opinion of the District Court denying a motion for judgment of acquittal (Pet. 12-15), incorporated by reference in the opinion of the Court of Appeals, is reported at 122 F. Supp. 382.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1955 (Pet. 16). The petition

for a writ of certiorari was filed on April 13, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Section 6(j) of the Universal Military Training and Service Act, requiring a conscientious objector to perform "such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate", a conscientious objector may refuse to perform institutional work for a county department of charities designated by the local board.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of the Universal Military Training and Service Act, and Regulations issued thereunder, are set forth in Appendix A, *infra,* pp. 12-17.

STATEMENT

Petitioner was convicted of refusal to comply with the order of a selective service board, in violation of 50 U.S.C. App. 462(a). He was sentenced to imprisonment for 18 months. (R. 11-12.) On appeal, the judgment was affirmed (R. 50).

Petitioner was classified as a conscientious objector on September 27, 1951 (R. 20). On October 20, 1952, he was sent a form of application for volunteer civilian work (Ex. pp. 81, 88).[1] He was

[1] The reference "Ex." is to Government Exhibit No. 1, comprising petitioner's selective service file (R. 18). The

also sent a form advising him of the requirement under the Selective Service Regulations that he specify to the board three types of civilian work which he could perform, the designation to be within the types of approved civilian work on file in the local board office, i.e. work at the Camarillo or Mendocino State hospitals (Ex. pp. 81, 83). Petitioner notified the board that he did not wish to volunteer (Ex. p. 82), and he returned the report form without filling in the blanks (Ex. p. 84).

On February 13, 1953, the local board, as the next step under the Regulations, sent a notice offering petitioner his choice of the following types of work contributing to the national health, safety or interest (Ex. p. 90):

> A. Institutional Helper—County of Los Angeles, Department of Charities—Salary $181 to $233 a month for a forty hour week.
>
> B. Psychiatric Technician Helper—Camarillo or Mendocino State Hospitals—Salary $200 a month for a forty hour week.
>
> C. Truck Driver, Truck Driver Helper, Building Maintenance Man, Salesman, Clerk, Repairman and Cashier—Goodwill Industries (projects approved at Stockton, Sacramento, San Francisco, Oakland, San Jose, Santa Ana, San Bernardino, or San Diego)—Salary from $125 to $150 a month for a forty hour week.

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page references are to the page designations enclosed in circles in the copy of the selective service record which has been lodged with the Clerk of this Court.

Petitioner returned the notice, rejecting the work (Ex. p. 90) and stating that his voluntary work as a Jehovah Witness was "the most charitable of all works", that the wages offered were less than half of what he was receiving as a lather in the building trade, and that his work as a Jehovah's Witness and as a lather contributed more to the national health, safety, and welfare than the work that was offered (Ex. pp. 91, 93).

Thereupon, the local board and a representative of the State Director arranged a meeting with petitioner. In advance of this meeting, petitioner wrote a five-page letter (March 30, 1953, Ex. pp. 97-102) in which he repeated the foregoing grounds for refusal and added a reiteration of his earlier, overruled claim that he should have been classified as a minister. He characterized the proffered work as "unsavory" and "insulting to any intelligent person, being occupations for indigents, 'skid-row bums' and mental incompetents" and argued that the benefit of the work, if any, would be to the State of California and that what was involved was "a wearing-away process devised to shake a person's faith in his God and in himself" (Ex. p. 100). He stated that he would "not be forced into any of these positions come what may" (Ex. p. 102).

At the meeting, petitioner again refused any and all work, upon substantially the same grounds, "salary first of all", and adding that his migraine headaches would not permit hospital work, and that while his then 30 hours per week as a lather

would not interfere with his activity as a Jehovah's Witness, a 40 hour work week would do so (Ex. pp. 104-105).

On June 17, 1953, petitioner was sent an Order to Report for Civilian Work, designating the Los Angeles County Department of Charities as the agency for which he was to work (Ex. p. 140). He requested an extension of time to August 12 on the ground that he wished to attend "an international convention of Christian people in New York City" (Ex. p. 150). The request was denied and petitioner replied with a two-page typewritten letter "refus[ing] to accept the unconstitutional, unsavory occupation", reasserting his claim that the work was a measure to chastise conscientious objection and that he should have been classified as a minister, and stating that he would refuse work in his home city as well (Ex. pp. 153-154). Petitioner failed to report at the time and place specified (Ex. p. 159). After receiving a further order to report on September 4, 1953, for institutional work at the Los Angeles County Department of Charities (Ex. p. 161), he again refused to comply, this time adding to the previous reasons the assertion that he was the sole support of his mother and father (Ex. p. 172).[1a]

At the trial before the District Judge without a jury, the facts were stipulated (R. 18-23). Petitioner's contentions were directed solely to the

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[1a] Petitioner did not claim dependency of his parents in his Classification Questionnaire, Sept. 26, 1950 (Ex. p. 9).

lawfulness of the requirement that as a conscientious objector he perform work for a non-federal government agency. The District Court rejected the contention, relying upon the decisions that have upheld the constitutionality of selective service legislation and work requirements on the part of conscientious objectors, and pointing out that war powers and national defense are not restricted to matters of arms alone (Pet. 14-15). The Court of Appeals affirmed, *per curiam*, upon the reasons stated by the district court (R. 49, Pet. 11).

ARGUMENT

While petitioner contends that Congress did not, and constitutionally could not, authorize Selective Service boards to require conscientious objectors to work for non-federal governmental agencies, his refusal to work for a county agency is based upon the same broad claims of involuntary servitude and deprivation of liberty that were repeatedly raised with respect to the work provisions of the predecessor Selective Training and Service Act of 1940 and as repeatedly rejected by the various courts of appeals.[2] The Court of Appeals below,

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[2] *Atherton* v. *United States*, 176 F. 2d 835, 840-842 (C.A. 9), certiorari denied, 338 U.S. 938; *Dingman* v. *United States*, 156 F. 2d 148, 149-150 (C.A. 9), certiorari denied, 329 U.S. 730; *United States ex rel. Zucker* v. *Osborne*, 147 F. 2d 135 (C.A. 2), affirming 54 F. Supp. 984, 987-988, certiorari denied, 325 U.S. 881; *Kramer* v. *United States*, 147 F. 2d 756, 759-761 (C.A. 6), certiorari denied, 324 U.S. 878; *Brooks* v. *United States*, 147 F. 2d 134 (C.A. 2), affirming 54 F. Supp. 995, certiorari denied, 324 U.S. 878; *Roodenko* v. *United States*, 147 F. 2d 752, 753-754 (C.A. 10), certiorari denied, 324 U.S. 860;

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in upholding petitioner's assignment to work for a county department of charities, adds its authority to a number of similar holdings of district courts.[3]

United States v. *Gormly*, 136 F. 2d 227, 228-229 (C.A. 7), certiorari denied, 320 U.S. 753; *United States* v. *Mroz*, 136 F. 2d 221, 223-225 (C.A. 7), dismissed pursuant to Rule 35, 320 U.S. 805; *United States* v. *Emery*, 168 F. 2d 454, 456 (C.A. 2); *Penor* v. *United States*, 167 F. 2d 553 (C.A. 9); *Wolfe* v. *United States*, 149 F. 2d 391, 393 (C.A. 6); *Heflin* v. *Sanford*, 142 F. 2d 798 (C.A. 5); *Weightman* v. *United States*, 142 F. 2d 188, 190-192 (C.A. 1); *Hopper* v. *United States*, 142 F. 2d 181, 186 (C.A. 9); *United States* v. *Van Den Berg*, 139 F. 2d 654, 656 (C.A. 7); and note the assumption of the validity of the work requirement, in *Gibson* v. *United States*, 329 U.S. 338, 358; *Falbo* v. *United States*, 320 U.S. 549.

[3] *United States* v. *Messerman*, 128 F. Supp. 759, 763-764 (M.D. Pa.), work at a state hospital; *United States* v. *Blankenship*, 127 F. Supp. 760, 763 (S.D. W.Va.), state hospital; *United States* v. *Sutter*, 127 F. Supp. 109, 117-119 (S.D. Cal.), Los Angeles County Department of Charities; *United States* v. *Hoepker*, 126 F. Supp. 118, 121 (E.D. Ill.), state hospital (appeal pending); *United States* v. *Kinney*, 125 F. Supp. 322, 324 (E.D. Ill.), state hospital; *United States* v. *Pomorski*, 125 F. Supp. 68, 72-74 (W.D. Mich.), affirmed, C.A. 6 (see Appendix B, *infra*, pp. 18-20), state hospital; *United States* v. *Thomas*, 124 F. Supp. 411, 415-416 (E.D. Ill.), University of Chicago Clinics (appeal pending); *United States* v. *Smith*, 124 F. Supp. 406, 410-411 (E.D. Ill.), state hospital (appeal pending). Appeals are also pending in the following unreported cases: *United States* v. *Klubnikin* (S.D. Cal.), Los Angeles County Department of Charities; *United States* v. *Diercks* (E.D. Ill.), state hospital; *United States* v. *Henderson* (S.D. Ill.), state hospital; *United States* v. *Olvera* (S.D. Tex.), Board of State Hospitals; *United States* v. *Reese* (N.D. Cal.), Los Angeles County Department of Charities; *United States* v. *Ransom* (N.D. Ill.), state hospital. And see *United States* v. *Gray*, No. 27820(2) (E.D. Mo.), Alexian Brothers Hospital, non-profit organization primarily engaged in charitable activity for general public. Cf. holdings of orders invalid in *United States* v. *Sparks*, No. IP-Cr. 30 (S.D. Ind.), Methodist Hospital, on the ground that assignment to work under direction of a religious group other than that of the registrant's affiliation was improper; *United*

On April 28, 1955, in an opinion which is set forth as Appendix B to this brief (*infra*, pp. 18-20) the Court of Appeals for the Sixth Circuit has upheld the assignment of a conscientious objector to work in a State hospital, and rejected the contention which is urged here.

Petitioner concedes that Congress "has the right to designate some sort of federal work for performance by conscientious objectors" (Pet. 7). However, he contends that by the use of the word "national" in the phrase "civilian work contributing to the maintenance of the national health, safety, or interest" in Section 6(j) of the Act, conscientious objectors who have been exempted from both combatant and non-combatant service may only be required to perform alternative civilian work for direct agencies of the Federal government (as distinguished from state, county and local government agencies) (Pet. 6). Section 6(j) shows on its face that the words "*national* health, safety, or interest" describe only the ultimate result or effect of the work which may be required of conscientious objectors. The phrase "civilian employment" is the only statutory characterization of the employment relationships in which such work may be required. Nothing in the Act even suggests that conscientious objectors may not be required to perform for state, county and city

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States v. *Copeland*, 126 F. Supp. 734 (D. Conn.), Goodwill Industries, Inc. (private employment). But in *United States* v. *Wilkinson*, Cr. 34388 (N.D. Cal.; Apr. 19, 1955) the court upheld an assignment to work with Goodwill Industries.

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agencies and institutions work which clearly contributes to the "national health, safety, or interest." As stated in *Roodenko* v. *United States,* 147 F. 2d 752, 755 (C.A. 10), certiorari denied, 324 U.S. 860:

> * * * It is contended that it is a local reclamation water storage and irrigation project of no national importance having no connection with the war effort. The proper maintenance of agriculture, civilian business, transportation, sanitation, health, and many other civilian activities are as essential to the successful prosecution of the war and as much a part of the war effort as the production of munitions of war and the arming and equipping of the military forces. The Act places the determination of what projects are of national importance with the President. Roodenko has no standing to challenge the exercise of this discretion by the President.

Both in his petition (p. 6) and in his supplemental brief, petitioner contends that since the work required of conscientious objectors under Section 5(g) of the 1940 Act was performed in camps under federal control, it must be assumed that Congress understood and intended that work required of conscientious objectors under the present Act should be performed only for Federal agencies. To the contrary, the present Selective Service regulations omit any provision for work camps because of Congressional opinion, expressed

during the debates on the present Act, that there would not be a sufficient number of conscientious objectors to warrant the expense of establishing a work camp system. 97 Cong. Rec. 6027. Nothing in this context of legislative opinion suggests a purpose to restrict such required work to Federal employment.

The validity of the work requirement, whether under federal, state or local direction, becomes evident when considered in the light of the reasons which have led the courts to sustain such requirements generally. It has been recognized that the morale of those in military service will obviously be lowered by allowing conscientious objectors not only full freedom from the dangers and confinement of military activities, but also substantial advantages for economic improvement over those in their age group in military service who cannot offer employers or customers a similar guarantee of uninterrupted availability. 97 Cong. Rec. 6026-6027, 6260; *Brooks* v. *United States*, 147 F. 2d 134 (C.A. 2), certiorari denied, 324 U.S. 878; *United States* v. *Smith*, 124 F. Supp. 406, 410 (E.D. Ill.); *United States* v. *Steinel*, 70 F. Supp. 966, 968 (D. Conn.). Moreover, it must be recognized that since exemption depends heavily upon the registrant's own assertion of inner beliefs, an exemption without further responsibility of any kind on the part of the registrant tends sharply to increase the presentation of false claims of conscientious objection. *Brooks* v. *United States*, 147 F. 2d 134 (C.A. 2), affirming 54 F. Supp. 995, 997, certiorari denied,

324 U.S. 878; *Weightman* v. *United States,* 142 F. 2d 188, 191-192 (C.A. 1); *United States* v. *Steinel,* 70 F. Supp. 966, 968 (D. Conn.). And not even in peacetime is it possible to ignore the contribution to the manpower pool for military service when persons of the younger age-group are channelled into work for the national benefit, thereby releasing at least some manpower from that area. *Brooks* v. *United States,* 147 F. 2d 134 (C.A. 2), affirming 54 F. Supp. 995, 997, certiorari denied, 324 U.S. 878; *Roodenko* v. *United States,* 147 F. 2d 752, 755 (C.A. 10), certiorari denied, 324 U.S. 860; *United States* v. *Smith,* 124 F. Supp. 406, 410 (E.D. Ill.); *United States* v. *Steinel,* 70 F. Supp. 966, 968 (D. Conn.).

CONCLUSION

The decision below is correct and there is no conflict of decision in the courts of appeals. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1955.

APPENDIX A

Statute and Regulations Involved

Section 1(c) of the Universal Military Training and Service Act 62 Stat. 604 (50 U.S.C. App. 451(c)):

> The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.

Section 6(j) of the Act 62 Stat. 604, 65 Stat. 75 (50 U.S.C. App. 456(j)):

> * * * Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, * * * if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of

section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. * * * The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that * * * if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. * * *

Section 12(a) of the Act, 62 Stat. 604 (50 U.S.C. App. 462(a)):

* * * Any * * * person who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more

than $10,000, or by both such fine and imprisonment * * *.

Section 1660.1 of the Selective Service Regulations (32 C.F.R. § 1660.1):

Definition of Appropriate Civilian Work.—(a) The types of employment which may be considered under the provisions of section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

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(b) Except as provided in paragraph (a) (2) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O.

Section 1660.20 of the Selective Service Regulations (32 C.F.R. § 1660.20):

Determination of Type of Civilian Work to be Performed and Order by the Local Board to Perform Such Work.—(a) When a registrant in Class I-O is found acceptable for service after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after notice of acceptability is mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not

been classified in Class I-O, unless he has volunteered for such work.

(b) If the registrant fails to submit to the local board types of work which he offers to perform, or if the local board finds that none of the types of work submitted by the registrant is appropriate, the local board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. The registrant, within ten days after such letter is mailed to him by the local board, shall file with the board a statement that he either offers to perform one of the types of work submitted by the board, or that he does not offer to perform any of such types of work. If the registrant offers to perform any one of the three types of work, he shall be ordered by the local board to perform such work in lieu of induction, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such

State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. The local board shall mail to the registrant a notice of the time and place of this meeting at least 10 days before the date of the meeting. If agreement is reached at this meeting, the registrant shall be ordered by the local board to perform work in lieu of induction in accordance with such agreement, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

APPENDIX B

No. 12337

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THOMAS WALTER POMORSKI, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Decided April 28, 1955

Appeal from the District Court of the United States for the Western District of Michigan, Southern Division.

Before SIMONS, Chief Judge, MCALLISTER and STEWART, Circuit Judges.

PER CURIAM. Appellant, classified under the Universal Military Training and Service Act (50 U.S.C. App. Sections 451-470) in Class I-O as a conscientious objector, was convicted in the district court of violating the Act in failing to report for work at the Northville State Hospital in Michigan as ordered by his local draft board. Section 456(j) of the Act provides in part that if a conscientious objector is found to be conscientiously opposed to participation in noncombatant service with the Armed Forces, he shall, in lieu of induction into the Armed Forces "be ordered by his local board, subject to such regulations as the

President may prescribe, to perform for a period equal to the period prescribed in Section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. . . ."

Section 1660.1 of the Selective Service Regulations, promulgated by Presidential Executive Order, lists the types of employment which may be considered as appropriate to be performed under the foregoing statutory provision as "civilian work contributing to the maintenance of the national health, safety, or interest." It includes "employment by the United States Government, or by a State, Territory or Possession of the United States, or by a political subdivision thereof, or by the District of Columbia."

Appellant argues that the order to perform work in a *state* institution, and the regulations permitting such an order, are in conflict with the statute because such work does not contribute to the "*national* health, safety, or interest." He alternatively argues that if the statute be interpreted to permit the local board to order him to perform civilian services for a state institution, it violates the Thirteenth and Fifth Amendments to the Constitution.

The record shows that the Northville State Hospital is a mental hospital, caring for members of the public in need of its services, including veterans whose cost of hospitalization is in part defrayed by the national government through the Veterans Administration.

We think the appellant's contentions are with-

out merit. The care and restoration of those in impaired mental health, whether carried on by a local, state or national institution, obviously contributes to the national interest. The regulations and order are thus clearly within the language of the statute. Moreover, the statute as so interpreted is clearly Constitutional. It is not the Constitution but Congressional policy which relieves the conscientious objector from the duty of bearing arms. *United States* v. *Macintosh,* 283 U.S. 605, 623, 624 (1931). The appellant, at his own request, was so classified as to be accorded the privilege of civilian work in lieu of the duty to enter the Armed Forces. There can be no Constitutional challenge of the validity of an Act which gave appellant conditional exemption from a service which he could Constitutionally be compelled to perform. *Roodenko* v. *United States,* 147 F. (2d) 752 (10 Cir., 1944), cert. den. 324 U.S. 860 (1945). See *United States* v. *Niles,* 122 F. Supp. 382 (N.D. Cal., 1954); *United States* v. *Smith,* 124 F. Supp. 406 (E.D. Ill., 1954).

The judgment of the district court is affirmed.

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